Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

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In the Matter of	)	
	)	
Rules and Policies Concerning	)	MB Docket No. 04-256
Attribution of Joint Sales Agreements	)	
In Local Television Markets	)	

To: The Commission

COMMENTS OF NBC UNIVERSAL, INC.

The *Notice* in the above-captioned proceeding does not offer any evidence that joint sales agreements ("JSAs") in the television industry routinely : i) endanger competition; ii) allow the joint seller to materially influence a subject station; or iii) adversely affect the public interest. The *Notice* merely assumes that, despite significantly different Commission precedent addressing radio and television JSAs, television JSAs are sufficiently similar to radio JSAs to warrant identical regulatory treatment. [1] But that superficial assumption overlooks substantial evidence that many television JSAs do not, in and of themselves, allow sufficient influence to merit attribution, and the many identifiable public interest benefits of these arrangements. Accordingly, NBC Universal, Inc. ("NBC") urges the Commission not to replace its long-standing presumption of nonattribution for television JSAs (subject to case-by-case Commission review) with an unjustified and inflexible policy that all television JSAs are *per se* attributable.

The Commission Should Not Deem All Television JSAs Attributable Without Clear Evidence that Television JSAs Uniformly Convey Material Influence

For many years, the Commission has presumed that a television JSA, in and of itself, does not create, on the part of the selling party, an attributable interest in the subject station. However, the

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1 *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rule Making, MB Docket No. 04-256 (¶ 2) (rel. August 2, 2004) (the "*Notice*").

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Commission has reserved the right to review television JSAs on a case-by-case basis to determine if, in a particular case, a JSA (along with any other related agreements) may create an attributable relationship. [2]

The *Notice* now proposes to replace the Commission's reasonable case-by-case approach with an inflexible *per se* rule that all parties to a television JSA hold an attributable interest in the subject station (assuming that the JSA involves a certain percentage of the station's total advertising time). The *Notice* does not offer any basis for this reversal of established Commission policy (with the potential to disrupt dozens of beneficial relationships) beyond a statement that the Commission has "no reason to believe that the terms and conditions of TV JSAs differ substantively from radio JSAs," which recently have been deemed to be attributable. [3] At most, the *Notice* points to a sole case where the Commission determined that a party with multiple arrangements with a station, including a JSA and a local marketing agreement, had so much control over the station that the party's interest was deemed to be attributable. [4]

Precedent has long established that the Commission should not change any Commission policy without a rational and well-supported basis for the change. That sensible policy protects private parties' settled expectations and limits unnecessary disruption of television service to the public. But the *Notice* does not offer a sufficient basis to cause the Commission to reverse its case-by-case policy for a *per se* rule that all television JSAs are attributable. To the contrary, the bulk of evidence available to NBC is that the established case-by-case approach better protects the public than an unthinking *per se* attribution rule.

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2 *See, e.g., Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests: Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast* Industry, 14 FCC Rcd 12559, 12612-13 (1999) ("*1999 Ownership Order*"), *on recon.*, 16 FCC Rcd 1097 (2001). The sensible rationale for this practice has been that joint selling arrangements between stations are similar to other sales representative relationships. Of the three operational elements of primary importance to the Commission – programming, personnel and finances – a mere sales arrangement, in and of itself, would seem to have minimal effect on personnel and how a station decides to invest its resources, and no material effect on programming.

3 *See Notice* (¶ 2).

4 *See Notice* (¶¶ 7, 13) (citing *Shareholders of the Ackerley Group, Inc. and Clear Channel Communications, Inc. for Transfer of Control of the Ackerley Group, Inc. and Certain Subsidiaries*, 17 FCC Rcd 10828 (2002) ("*Ackerley*")).

NBC's Substantial Experience with Television JSAs Confirms That JSAs Should Not Be *Per Se* Attributable

NBC has attributable ownership interests in 30 full-power television broadcast stations. [5] Several of these stations, or parties with attributable interests in these stations (collectively, the "NBC Stations") have JSAs with other television stations, each an affiliate of the Pax Network (collectively, the "Pax Stations"), in which NBC has no attributable interest.

Most of these 12 JSAs have been in place for at least four years. During that period, an NBC Station has served as the sales agent for a Pax Station in return for a commission (i.e., a fixed percentage of the net revenues resulting from those sales). In the aggregate, the Pax Stations *retain approximately nine-tenths of the net revenues from such sales*, with the remaining being paid to the NBC Station as a commission. [6] Accordingly, contrary to the *Notice*'s assumption, the licensees of the Pax Stations bear substantial positive and negative economic risk under the JSAs, including an obligation to reimburse the NBC Station for certain budgeted sales-related costs. In addition, the Pax Station bears significant responsibility to maintain its ratings: if the Pax Station fails to meet certain rating targets, then the NBC sales team can meet lower projected annual sales targets without risking immediate termination of the JSA.

The other terms of a typical such agreement also limit NBC's role. According to a typical such agreement, the relevant NBC Station, among other items:

- Has no right to control, supervise or direct any aspect of the management or operation of the [Pax Station] and such management and operation shall be and remain the sole responsibility of, and under the control and direction of the Pax Station.
- Must present Pax an annual projected budget of advertising costs and revenues, which is subject to Pax's review and approval. Pax has no obligation to reimburse non-commission costs significantly in excess of those budgeted.

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[5] General Electric ("GE"), NBC's parent company, controls 14 NBC affiliates and 15 Spanish-language stations. It also has an attributable indirect interest in, but does not control, one electronic retail television station.

[6] This approximation is based on 2003 advertising revenues for the Pax Stations. Specific commissions may vary depending on the programming in which specific advertising is sold.

- Is responsible for any advertising revenue shortfall, as Pax has the right to terminate the agreement if, among other items: i) actual revenues from the NBC Station's sales for the Pax Station significantly miss projected revenues (as measured in percentage terms and reduced in proportion to any projected shortfall in the Pax Station's ratings); or ii) the NBC Station fails to cure its material breach of the agreement.
- Is to provide the Pax Station with up to one hour per weekday of syndicated programming, at no additional (non-barter) expense to the Pax Station, and the Pax Station has the right, subject to the parties' further mutual agreement, to re-broadcast specific news content from the relevant NBC Station.
- Must seek to maximize revenue from the sale of the Pax Station's advertisements, and must not seek to benefit an NBC Station to the detriment of the relevant Pax Station.

The agreement is further subject to all Commission requirements and has a 10-year term.

These JSAs, individually or in the aggregate, do not afford NBC or the NBC Station an opportunity to influence the overall operations of the Pax Stations. Rather, these JSAs sensibly align the interests of the Pax Stations with that of the NBC Station, Pax's contracted sales agent, but limit the NBC Station's input to what is appropriate for its role. NBC Stations benefit from these agreements only insofar as they sell advertising for the Pax Stations. Conversely, Pax has every incentive to operate the Pax Stations in the best manner possible, as it retains approximately 90 percent of the net revenues of all advertising sales made pursuant to these JSAs, and must pay all costs of the Stations (except for any sales-related costs that substantially exceed the amounts specified in the annual advertising sales budget, which is subject to Pax's yearly approval). Under any Commission standard, this sort of JSA, which leaves demonstrable economic risk with the station being joint sold, should not be attributable.

No Evidence Demonstrates That Television JSAs Pose Any Material Threat To Local Media Competition

Regardless of the specific terms of a television JSA, the fundamental argument for changing the nonattribution of television JSAs is demonstrably incorrect: TV JSAs do not pose a sufficient threat to television competition to justify attribution.

First, there is no evidence that television JSAs, in general, have had a material adverse effect on local media competition in their markets. Television JSAs have existed for years. They are located in dozens of markets. Yet, no data in this proceeding has identified even a single market where a television JSA, in and of itself, actually has had a material adverse effect on video programming competition in that market. [7] Without compelling measurable evidence that JSAs invariably harm competition in these markets, it would be contrary to the public interest to restrict a television station's ability to contract with whomever they believe can best improve the station's income (and, in turn, enhance the station's acquisition of quality programming and service to its community).

Second, unlike with radio JSAs, Commission precedent has not addressed a sufficient number of television JSAs to determine what constitutes a "typical" television JSA. Prior to deeming all radio JSAs attributable in July 2003, the Commission had raised, in multiple proceedings, the possibility that a particular sort of in-market radio JSA might result in adverse anticompetitive effects. [8] Accordingly, the Commission had had the opportunity to review the terms of multiple radio JSAs in the context of particular markets prior to determining that radio JSAs should be, as a rule, deemed to be attributable.

In stark contrast, the *Notice* in this proceeding cites to a single instance where the Commission has analyzed the influence gained from a television JSA. [9] That lone case -- *Ackerley* -- is insufficient to justify a change in Commission policy with respect to television JSAs. First, *Ackerley* involved a JSA with a flat monthly fee paid to the station licensee with no upside or downside economic risk borne by the licensee. An occasional television JSA may follow this pattern, but a single instance is hardly sufficient to define the entire class of television JSAs as attributable. Second, *Ackerley* did not find that even that television JSA, in and of itself, was sufficiently influential to warrant attribution. In *Ackerley*, the relevant JSA was but one of multiple arrangements between the relevant parties. What was deemed attributable was the totality of

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7 The *Ackerley* instance cited in the *Notice* is no exception. *See Notice* (¶¶ 7, 13) (citing *Ackerley*, 17 FCC Rcd at 10842).

8 *See, e.g., Whithall Enterprises, Inc.*, Hearing Designation Order, 17 FCC Rcd 17509 (2002) (designating proposed radio transaction for hearing in part to review possible anticompetitive effects of radio JSA); *Sheldon Broadcasting, Ltd.*, Hearing Designation Order, 17 FCC Rcd 13931 (2002) (same).

9 *See Ackerley*, 17 FCC Rcd at 10834-42.

multiple arrangements between Ackerley and the relevant station, including the JSA and a local marketing agreement that addressed up to 15 percent of the station's program schedule.

Third, recent Commission precedent has not addressed any market in which any television JSA actually raised a material risk to local video competition. In the radio context, the Commission had specific knowledge that radio JSAs have raised significant antitrust concerns, notwithstanding the Commission's local radio ownership restrictions. For example, in a case involving a radio merger among Cincinnati radio stations, the Justice Department affirmatively limited a radio station buyer from engaging in *all* joint sales agreements in the market without prior notice to the Justice Department, regardless of whether the arrangement would have complied with the Commission's regulations in effect at that time. [10]

Again in contrast, NBC does not know of any circumstance in at least the last decade in which a television JSA prompted antitrust concerns similar to those addressed in *Citicasters*. That is in part due to the different local competitive environment facing television stations, which compete not only against each other but also against hundreds of pay television networks and local cable operators. It also is in part due to the Commission's local ownership rules, which are far more restrictive of local television station ownership than local radio station ownership. For example, under the current version of the Local Television Ownership Rule (the "Rule"), [11] a party cannot have attributable interests in more than two television stations, even in the nation's largest markets. The Rule also prohibits a party from acquiring an attributable interest in a second top-four ranked station. Accordingly, under the Rule, and absent a waiver, a television duopoly can involve only one of a market's top four stations, while a single owner – at least theoretically – can acquire *all* of the top eight leading radio stations in a market. Obviously, the addition of a JSA arrangement to the latter radio combination is far more likely to create real antitrust concerns than

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[10] *See Shareholders of Citicasters Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19142 (1996).

[11] For purposes of this discussion, and because the Third Circuit has arguably stayed application of the Local Television Ownership Rule, *see* 47 C.F.R. § 73.3555(b), that the Commission adopted in June 2003, the form of the Rule addressed here is that in place prior to June 2003. *See, e.g., Notice* at n.1.

the addition of JSA arrangement to, in the most extreme case, a television duopoly where one of the outlets is required not to be one of the top four rated stations in the market.

NBC's *own experience confirms that many JSAs involve smaller, less competitive stations in a* market. These JSAs enable the weaker station to draw on the resources and expertise of a stronger station in the market. For example, the NBC Stations' JSAs are with Pax affiliates, which tend to be among the less viable stations in a market.

Fourth, the current Local Television Ownership Rule underscores that JSAs cannot be deemed to create an attributable interest. [12] The current Rule, absent a waiver, blocks a party from having attributable interests in more than two stations in any market, no matter how large the market. The essential justification for this strict limit is that additional same-market television interests would result in material injury to local video competition. However, if JSAs were uniformly attributable today, NBC's television interests have exceeded the Rule's limits in multiple markets for several years. Yet, no analysis has shown any demonstrable injury to competition in these markets. Accordingly, the Commission must conclude that: (i) television JSAs should not be generally attributable; ii) the Commission's Local Television Ownership Rule, as it currently stands as a result of the Third Circuit's stay, is unjustifiably restrictive; or iii) both.

For example, in New York, NBC already has attributable interests in two stations, the maximum possible under the Rule. NBC also has a JSA in that market. If JSAs should have been attributable, NBC has exceeded the "maximum" safe limits in New York for the last several years. But there is no clear evidence that NBC has posed or poses a real threat to competition in the New York market. Indeed, the New York designated market area remains one of the most competitive and diverse markets in the nation, with 18 independent television owners and dozens of other sources of pay television and competing media. [13] As NBC's ownership of two stations, and its JSA relationship with a third, has not had a material

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12 *See id.*

13 *See In the Matter of 2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, Appendix C (2003) (the "*2002 Biennial Order*"), *affirmed in part, remanded in part, Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

adverse effect on that market, it is impossible to conclude that television JSAs, as a rule, actually harm video programming competition.

Such analysis is not limited to New York, which has an unusually large number of television stations. [14] Proponents for changing the Commission's long-standing television JSA policy also have not demonstrated that other large or mid-sized markets have witnessed materially adverse effects on local video competition from television JSAs. For example, in Chicago, NBC again has attributable interests in both the NBC and Telemundo affiliates, as well as having a JSA with a Pax station. Yet, again, the Chicago television market remains one of the most competitive and diverse in the nation, with 13 independent television owners (including NBC and Pax) and dozens of other sources of pay television and competing media.

There Is No Evidence That Television JSAs Are Sufficiently Like Radio JSAs to Justify Identical Treatment

Television is not radio. Among other differences, television requires more resources than radio, for reasons ranging from the cost of programming to the simple matter of generally higher electrical power requirements to operate television transmitters. The costs of programming cause many television stations to rely on others to deliver programming, in exchange for advertising time or other valuable consideration.

Free, over the air television stations also face far greater competition -- including cable and DBS operators -- than faced by radio from national sources of audio programming. For example, cable operators now account for approximately 13 percent of local television advertising sales, which is a critical source of revenue for (and was formerly the exclusive province of) local television stations. [15]

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[14] Indeed, television competition in New York is so great (notwithstanding NBC's interests in two stations and JSA with a third) that the Commission has concluded that outright ownership of three television stations in that market was consistent with the public interest. *Id.* (¶¶ 134, 140).

[15] According to Veronis Suhler & Associates (via *Broadcasting & Cable*, (rel. June 17, 2002)), local cable systems have increased their share of local television advertising since 1995, and were expected to reach 16.4 percent of local advertising share by 2005.

Moreover, compared to these other media, television stations are far more constrained by ownership and other regulatory restrictions. Under the current Local Television Ownership Rule, a television operator can own no more than one station in many local television markets, while a radio operator can own five or even up to half of the local radio stations in many of these same markets. Even in markets with dozens of local television outlets, like New York or San Francisco, a television owner now can have attributable interests in no more than two television stations under the Rule. Television stations also are far more expensive than radio stations in similar markets. Even smaller radio operators often can afford multiple radio outlets in the same markets to achieve some economies of scale. But television stations require much more capital, so that many station owners cannot afford acquisition of a second station in order to consolidate their sales operations. For these stations struggling to remain afloat in this "sea of competition", [16] JSAs offer an opportunity to benefit from other local stations' sales expertise while maintaining a market's established level of ownership and programming diversity.

Similarly, television JSAs do not mirror radio JSAs. Television JSAs must reflect the complexities unique to local broadcast television. Most important, many television JSAs do not involve the joint seller paying the station a flat monthly fee in exchange for all advertising revenues. The Commission was concerned with radio JSAs because they often involve a flat fee being paid to the licensee, [17] which eliminated any economic upside or downside to the licensee and diminished any real interest that the licensee had in operating the station effectively and efficiently. In television, as the NBC Stations' JSAs with the Pax Stations demonstrate, many JSAs have other financial arrangements.

These differences directly answer the concerns raised by the Notice, and confirm that a blanket policy of *per se* attribution of JSAs would injure the public interest.

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16 *See generally* Jonathan Levy, Anne Levine and Marcelino Ford-Livene, FCC Media Ownership Working Group Study No. 37, "Broadcast Television: Survivors in a Sea of Competition" (available at www.fcc.gov.)

17 *2002 Biennial Ownership Order*, 18 FCC Rcd at 13743.

Without Proof of Actual Harm, the Commission Must Grandfather All Existing JSAs As Nonattributable

Regardless of what the Commission does prospectively, the Commission has no basis to disrupt established JSAs without clear evidence that those JSAs have caused and are causing demonstrable injury to competition among video programmers. Without clear evidence of ongoing competitive injury caused by a specific JSA, the Commission should not disrupt the parties' settled expectations in that JSA. As there has been no showing that any of the NBC Stations' JSAs with the Pax Stations cause any anticompetitive or other significantly adverse effects, the Commission should grandfather these relationships indefinitely.

Conclusion

For the foregoing reasons, established Commission policy for television JSAs should not be replaced with a blanket policy that all television JSAs must be attributable.

Respectfully submitted,

NBC UNIVERSAL, INC.

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October 27, 2004

DECLARATION

I, F. William LeBeau, Assistant Secretary of NBC Universal, Inc., under penalty of perjury, hereby declare that the foregoing Comments are true and accurate to the best of my personal knowledge and belief.

F. William LeBeau

F. William LeBeau

Dated: 10/27/04